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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

STANLEY MILLER, PETITIONER

v.

PORT OF ILWACO, A WASHINGTON MUNICIPAL
CORPORATION, AND ROBERT PETERSEN,
INDIVIDUALLY, AND AS PORT MANAGER

PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF THE STATE OF
WASHINGTON

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QUESTIONS PRESENTED

1. Whether tenants of a port which is a municipal corporation may be denied due process protection by the port on the grounds the tenant has no property rights in a moorage contract?

2. Whether a port, by asserting governmental police power, may remove a vessel from its contracted for moorage and deprive such tenant of such moorage without notice of any type or without any opportunity for any type of hearing, and whether such removal violates due process standards?

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PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF THE
STATE OF WASHINGTON

Petitioner, by and through his
attorney, Peter J. Mozena, petitions for
a writ of certiorari to review the
judgment of the Court of Appeals of the
State of Washington.

OPINIONS BELOW

The opinion of the Washington Court of Appeals (App. A, *infra*) is an unpublished opinion.

JURISDICTION

The decision of the Washington Court of Appeals was entered on October 25, 1983. On January 6, 1984 the Supreme Court of Washington entered its order denying review from the Washington Court of Appeals. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS

1. The Fourteenth Amendment to the United States Constitution provides in relevant part:

...nor shall any State
deprive any person of life,

liberty, or property, without
due process of law...

2. Revised Code of Washington, Sections
53.04.010 et seq.

STATEMENT OF THE CASE

Petitioner, Stanley Miller, has been involved in charter-fishing operations since 1965. RP, Vol. I, page 239. In 1974, he purchased the vessel Lulu B. RP, Vol. I, page 241. During the period of 1974 to 1976, Petitioner renovated the Lulu B, in order to obtain sea worthiness certification from the United States Coast Guard. RP, Vol. II, page 244. It was admitted at trial that Petitioner was certified by the United States Coast Guard to operate a charter-fishing vessel, RP, Vol. II, page 403, and he did so, catering largely to senior citizens. RP, Vol. II, pages 25-251.

It was admitted at trial that Petitioner entered into an agreement with Respondent, Port of Ilwaco, for the lease of a moorage slip on "P" float. RP, Vol. II, page 403. Initially, the parties agreed that the Lulu B would occupy berth number P-40. RP, Vol. I, page 256. The Port of Ilwaco is so designed that vessels moor side by side, two to a berth. RP, Vol. I, page 23. The distance between finger piers, the space to be shared between two vessels, is 28'9". RP, Vol. I, page 57.

When Petitioner attempted to occupy space P-40, he discovered that the Lulu B, which measured 11.1' at its widest point, was to share a berth with the Lady Luck, which had a 14' beam. RP, Vol. I, page 57. Under the circumstances, and allowing for differences of design between the two vessels, this left

insufficiently maneuvering room. RP, Vol. I, page 57.

Accordingly, Petitioner brought these facts to the attention of the port manager. RP, Vol. II, page 257. The office manager of the port temporarily assigned the Lulu B to slip P-80, and thereafter the parties orally agreed that the Lulu B should occupy slip P-58. RP, Vol. II, page 261. Slip P-58, like slip P-40, was within approximately 100' of the access to the parking lot, and was therefore an equally good location from Petitioner's point of view. RP, Vol. I, page 262.

At the time, the Port of Ilwaco's published tariffs incorporated two provisions which dealt with the relocation, reassignment, and movement of vessels from one berth to another. Item No. 7 of the tariff read: "Port of Ilwaco

reserves the right to reassign all moorage berths each year; no persons or firm having priority." RP, Vol. I, page 69. Item No. 10 of the tariff provided that: "Boats may be moved by the port manager for the protection of life or property. Any vessel, which, in the opinion of the port manager, is in danger of sinking or is a hazard to other vessels or the premises, may be removed forthwith...". RP, Vol. II, page 389.

Notwithstanding the fact that the port's rules and regulations quoted above forbid the use of priority in the reassignment of berths, defense witnesses Steven Gaskill and Leslie Peterson both testified to the existence of a seniority-based priority system among tenants of the port.

"Q. Mr. Gaskill, are you familiar with the custom with regard to the continuing right

to use the boat moorage? That is, in the Port of Ilwaco?

"A. Well, my understanding is and always have been since I've been around down there, when you are issued a permanent moorage -- they can issue you a temporary moorage and you don't have anything to say about it, but mine was issued to me as a permanent moorage. That's my moorage as long as I keep up the payments of my rental, and that I keep up with all the rules and regulations down there. Until I sell my boat, it's still mine." Steven Gaskill, direct, RP, Vol. II, at 373-374.

"Q. Is there a custom at the Port of Ilwaco with regard to berth rights once rent has been paid and application approved?

...

"A. The custom is, once you acquire a berth, if you live up to the rules and regulations and maintain the payment on the berth, you're entitled to that moorage as long as you comply with the regulations.

"Q. That's because you have a right to continue to renew it?

"A. Yes.

"Q. And do you require seniority rights so-to-speak?

"A. Yes, you do." Testimony of Leslie Peterson, direct, RP, Vol. ii, at 357.

Mr. Gaskill testified that he complained to the port management that the Lulu B was occupying "his" slip, that the port management assured Mr. Gaskill that they would remove the Lulu B, and the port management did so immediately in response to his complaint:

"...I requested that they move that cockeyed boat out of there.

"Q. Are you referring to the Lulu B?

"A. The Lulu B. The next day I put my boat in the water..., I looked right over at P-58 and there sat that cockeyed boat again. I called the office, and Bob [Mr. Robert Peterson] answered. I said, 'Bob, that cockeyed boat is still in my moorage.' He said, 'Mr. Gaskill, I will get it out of there.' In about 20 minutes

they moved it and I put my boat
back into my moorage."
Testimony of Steven Gaskill,
direct, RP, Vol. II, page 373.

Notwithstanding this testimony,
Robert Peterson, port manager, testified
that he relied on provision No. 10 of the
tariff, the provision governing hazards,
as his authority for removing the Lulu B
from slip P-58. RP, Vol. II, page 389.
The Lulu B was subsequently berthed in
slip P-2, 410' away from the gangway and
access to the parking lot. RP, Vol. I,
page 26. Robert Peterson admitted that
no notice was given to Petitioner of this
change. RP, Vol. I, page 29.

Some time later Petitioner
discovered the removal of his vessel.
Petitioner protested the removal of the
Lulu B to slip P-2. Negotiations were
commenced by the Petitioner to attempt to
secure moorage. The port, through its

attorney, refused. (See Letters, Appendix admitted into evidence at Trial Court). The port placed burdens on the Petitioner that could not be met, in order to obtain moorage (obtaining to side by side moorage space in a crowded port). Petitioner lost his business and, ultimately, his vessel was repossessed and suit commenced. (See Petitioner's Additional Factual Statement, Appendix B, and letters, Appendix C).

The federal question was raised when the trial judge gave the port's instruction: "A port district has the legal authority under its general police power to move boats and reassign berths for the protection of other boats." RP, Vol. II, page 446. Petitioner excepted. The port relied on its police power without notice to Petitioner to move his boat. The jury, based on the instruction

granting police power to the port, rendered a verdict for the port. Motions for a new trial or judgment n.o.v. were denied.

Mr. Miller appealed to the Washington Court of Appeals. In his Appellant's Brief, Petitioner assigned error to the jury instructions which failed to recognize due process limitations to the use of police powers and in failing to give an instruction requiring notice. In an unpublished opinion on October 25, 1983, the court affirmed the proceedings at the trial court.

In the petition for review to the Washington Supreme Court, Petitioner presented his constitutional deprivation as issue for review. On January 6, 1984, the court denied review.

REASONS FOR GRANTING THE PETITION

This Court should accept review of this case and issue a writ of certiorari because the Court of Appeals of the State of Washington has taken a position on an important federal question which is in opposition to the decisions of this Court.

In this case a port manager utilized brute municipal power in towing a charter boat from a contracted moorage without any notice to the vessel's owner. Yet the Washington Court of Appeals held that benefits arising from municipal contracts are unprotected by procedural due process because they involve proprietary functions. This novel interpretation of the Fourteenth Amendment was not accompanied by citation to any prior judicial opinion, state or federal.

1. The opinion of the Washington Court of Appeals misunderstood the longstanding application of Fourteenth Amendment protections against state action. In Luger v. Edmunson Oil Co., 457 U.S. 922, 937 (1982), this Court set forth a two part test to determine if a deprivation is fairly attributable to a state.

"First the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible. Second, the party charged with the deprivation must be a party who may fairly be said to be a state actor." Ibid.

The Port's police powers flow directly from the State of Washington's authorization to form and operate as a municipal corporation. RCW 53.04.010 et seq. In the instant case because the port manager is a key municipal official,

application of the Lugar rule produces a finding of state action.

Municipalities are merely political subdivisions of a state, Reynolds v. Sims, 377 U.S. 533 (1964), and municipal acts constitute state action for Fourteenth Amendment purposes. North American Cold Storage Co. v. Chicago, 211 U.S. 306 (1908); New Orleans Waterworks Co. v. Louisiana Sugar Co., 125 U.S. 18 (1887). Yet the Washington Court of Appeals found no state action because the port was not exercising a governmental function.

This is a simple breach of contract case. Merely because the port is a municipal corporation does not mean that its every action is subject to due process considerations.

* * * * *

Here the port was engaged in the furtherance of its proprietary, as opposed to its governmental, functions. Its

actions were neither legislative nor quasi-judicial in nature. Court of Appeals opinion, Appendix A.

In its decision the court apparently applied the "public function" test of state action to a municipal corporation. That reasoning misses the logic of the test. This Court devised the "public function" and other similar test to recognize indirect state involvement in private conduct. Lugar v. Edmunson Oil Co., 457 U.S. 922, 939 (1982). See also Terry v. Adams, 345 U.S. 461 (1953) and Marsh v. Alabama, 326 U.S. 501 (1946). The Washington Court of Appeals characterized the raw force of municipal police powers as nongovernmental. Such a characterization is utterly without regard to this Court's earlier decisions.

2. Petitioner's property should have been accorded due process

protections. Generally, when an individual has been deprived of protectable property through state action some form of safeguard has been required by due process concerns. Mathews v. Edlridge, 424 U.S. 319 (1976). Mr. Miller's claim fulfills each of these elements necessary before process is due.

The Washington Court of Appeals opinion did not follow the analysis of Board of Regents v. Roth, 408 U.S. 564, 577 (1972), in determining whether or not the contract benefit was eligible for protection. Roth requires that state law create and define the claim of entitlement to the property. Mr. Miller's claim to a berth stems from an agreement with the port. It is axiomatic that Washington law recognizes and enforces contractual relationships. Ritter v. Board of Commissioners of Adams

County Public Hospital District No. 1, 96 Wn.2d 503, 637 P.2d 940 (1981); Dix Steel Company v. Miles Construction, Inc., 74 Wn.2d 114, 443 P.2d 532 (1968).

The second prong of the Roth analysis requires that federal law determine whether the interest is protected by the Fourteenth Amendment. In prior decisions this Court has protected contract benefits as a form of property. Justice Brandeis wrote in regard to an insurance contract: "Valid contracts are property, whether the obligor be a private individual, a municipality, a state or the United State." Lynch v. United States, 292 U.S. 571, 579 (1934); followed in Thorpe v. Housing Authority of City of Durham, 393 U.S. 268, n.31 (1969).

The Washington Court of Appeals ignored this Court's opinions requiring

some form of notice and hearing before deprivation of protected property. Mathews v. Eldridge, 424 U.S. 319, 333 (1976); Wolff v. McDonnell, 418 U.S. 539, 557 (1974). At the very least Mr. Miller should have been notified and given an opportunity to tell his story to the port manager before the Lulu B was towed from the disputed berth. The port manager's action conflicts with this Court's long tradition of emphasizing notice before a state assisted deprivation of property. Greene v. Lindsey, 456 U.S. 444 (1982); Memphis Light, Gas & Water Division v. Craft, 436 U.S. 1 (1978); Mullane v. Central Hanover Trust Co., 339 U.S. 306 (1950).

The importance of Petitioner's contractual benefits to him should be contrasted with the port's interest in moving the boat. Mathews v. Eldridge,

424 U.S. at 335. A port regulation, Tariff 7, item number 10, allows the port manager to relocate boats which are a hazard to other vessels. In this case, the port's manager had little justification for invoking his power. There was no showing of exigence; while stationary in her berth the Lulu B presented absolutely no hazard to other craft. Yet within twenty minutes of the arrival of the other vessel holding disputed rights to the slip, the port manager removed the vessel. The port used power which bore little resemblance to its authority without offering basic fairness to Mr. Miller who was seriously damaged.

3. The trial judge committed prejudicial error by refusing to limit the port's police powers with due process considerations. Mr. Miller sued for

breach of contract because the port had moved his charter boat from its agreed upon berth. As an affirmative defense the port alleged that its police powers gave it the right to remove the vessel. By refusing to direct a verdict for the port, the judge made the presence of the moorage contract at P-58 an issue for the jury. The jury also had to decide whether or not the port had acted within its authority by removing Mr. Miller's charter boat without first giving notice to Mr. Miller. Because the jury instructions did not encumber the port's power with due process duties the jury could have found all the facts necessary for protected property and still have declared the port's deprivation without prior notice proper. Allowing the jury to contravene prior decisions of this Court is egregious error. Mis-stating

the law to the jury necessarily harmed Mr. Miller's chances of prevailing. In addition this prejudicial error taints any interpretation of the general verdict concerning the disputed contract for berth P-58. A jury instruction containing prejudicial error on a matter of Constitutional protections warrants summary reversal.

4. The errors at the trial and appellate levels have widespread implications. In affirming, the Washington Court of Appeals denied due process to protected property. Petitioner lost his charter boat business because the port summarily shifted his moorage. The possibility of this type of deprivation threatens all commercial fisherman using public facilities in the State of Washington. Use of the same reasoning could affect shipping

companies' moorages, airline's passenger gate locations and any other user of municipal facilities. Municipal corporations asserting police power could forcefully remove favorable shipping company moorages and airlines from their airport facilities arbitrarily. In Mr. Miller's case this was both a detriment to the business concerned and to the senior citizens in which he served. To all of these potentially affected businesses who entered contracts because of their commercial stability the concept of protected property is vital.

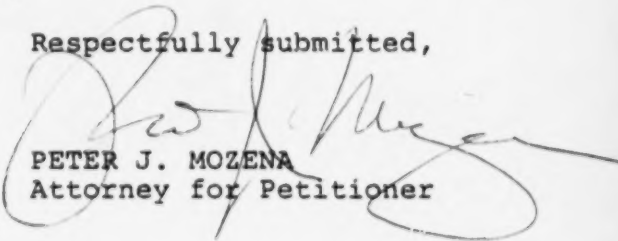
CONCLUSION

The Washington Court of Appeals has embarked on an unprincipled new interpretation of state action in direct conflict with numerous decisions of this Court. This jurisprudential break from

tradition devastated the Petitioner and threatens the application of Fourteenth Amendment protections in the State of Washington.

For these reasons the writ should be granted, the decision of the Washington Court of Appeals summarily reversed and the case remanded for further determinations.

Respectfully submitted,



PETER J. MOZENA
Attorney for Petitioner

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON

STANLEY MILLER,)	NO. 5531-7-II
)	
Appellant,)	DIVISION TWO
)	
v.)	UNPUBLISHED
)	OPINION
PORT OF ILWACO, a)	
Washington Municipal)	
Corporation, and)	
ROBERT PETERSEN,)	
individually, and)	
PORT MANAGER,)	
)	
Respondents.)	FILED: October 25, 1983

REED, J. -- In April 1977, Stanley Miller rented moorage at the Port of Ilwaco marina for his boat, the Lulu B. Miller had been renovating the Lulu B for use as a charter fishing boat since his purchase of her in 1974. Miller's plan was to cater his charter business primarily to senior citizens. At the time he leased the moorage from the Port his business was just beginning.

The Port of Ilwaco first assigned Miller's boat to space 40 on P float (P-40). The marina at the port of Ilwaco consists of several floats. Each float is divided into berths by finger-like piers. There is one pier between every two boats, that is, two boats dock side by side between every pier. P-40 is located within 100 feet of the ramp which connects the float to the land. Miller liked this location because it allowed easy access for senior citizens. Miller first moored the Lulu B at P-40 in June 1977, the very beginning of the charter fishing season. He found that there was insufficient maneuvering room between the Lulu B and the large boat sharing the berth. Miller complained to the Port and left with the Lulu B. When he returned in late July, space at the marina was limited. The summer boating season was

in full swing. The Port was then unable to make a permanent assignment for the Lulu B to a space close to the ramp because all those berths were assigned to other boats. The Lulu B was temporarily assigned to P-80. The Port told Miller that P-2 was available as a permanent moorage. P-2 is at the end of the float farthest from the ramp. Miller moored the Lulu B at P-80 for about 1 week in late July 1977. Then he began mooring her at P-58. P-58 is close to the ramp and an ideal location from Miller's point of view. The difficulties commenced. The boat owner assigned to P-58 complained to Robert Petersen, the Port manager, about the Lulu B being moored in his space. The owner of the boat moored next to the Lulu B in P-58 also complained; he feared the rough state of the Lulu B's steel exterior might damage

his wooden boat. On August 3, 1977, without notifying Miller, Robert Petersen had the Lulu B towed from P-58 to P-2 at the far end of the pier.

Miller filed suit against the Port of Ilwaco and its manager Robert Petersen in October 1978. He alleged that the removal of his boat from P-58 to P-2 was a breach of contract or "arbitrary and capricious action" entitling him to damages. The damages claimed were profits lost from his charter fishing business and the loss of his boat to creditors. The case was submitted to the jury on both theories. The jury returned a general verdict in favor of the defendants. Miller appeals.

In his attack on certain jury instructions either given or refused, Miller attempts to make a constitutional argument. Relying on such authorities as

Boddie v. Connecticut, 401 U.S. 371, 28 L.Ed.2d 113, 91 S.Ct. 780 (1971) and Ritter v. Board of Comm'r of Adams Cy. Pub. Hosp. Dist. 1, 96 Wn.2d 503, 637 P.2d 940 (1981), he claims he had a "property interest" in his berth at the Port. Pursuing a tortured interpretation of such procedural due process decisions, he contends the Port - because it is a governmental agency - was required to give him "notice and an opportunity to be heard" before it ousted the Lulu B from P-58, i.e., deprived him of his "property interest".

Nonsense! This is a simple breach of contract case. Merely because the Port is a municipal corporation does not mean that its every action is subject to due process considerations.

The same rules invoked in the construction of contracts between private individuals and

corporations are generally applicable in the construction of municipal contracts. Hence, in reference to matters of contract a municipal corporation is usually regarded and treated as a private person, and its contracts construed in the same manner and with like effect as those of private corporations and natural persons. It is regarded as a government only with respect to governmental powers granted by the state. 'It is well settled that the contracts of a municipal corporation, when exercising other than its governmental functions, and within the limits of its charter powers, are construed by the same laws that govern the contracts of private parties.'

(Citations omitted.) 10 E. McQuillin, Municipal Corporations §29.116 (3d ed. 1981). See also 56 Am.Jur.2d Municipal Corporations § 498. (2d ed. 1971).

Here, the Port was engaged in the furtherance of its proprietary, as opposed to its governmental, functions. Its actions were neither legislative nor

quasi-judicial in nature. Being empowered to do so, it contracted with Miller just as any private person would do. That contract incorporated the terms and conditions of the Port's regularly adopted tariff, the provisions of which specifically reserve to the Port the right to assign berths and relocate boats.

Because this was an action for breach of contract - nothing more, nothing less - under the instructions to which no proper exceptions were taken, it was incumbent on Miller to establish his contractual right to a particular berth. He obviously failed to convince the jury, either that he was entitled to P-58, or that the Port breached its contract by moving the Lulu B. Because the jury returned a general verdict for the defendants, it must be presumed the jury

found against Miller on this issue. See Golberg v. Sanglier, 96 Wn.2d 874, 639 P.2d 1347 (1982); DeYoung v. Campbell, 51 Wn.2d 11, 315 P.2d 629 (1957).

It is regrettable that the Port chose to assert that it was exercising its "police powers" when it moved the Lulu B. By doing so, the Port merely stimulated more due process protestations from Miller and helped becloud the otherwise clear-cut issues, both here and in the trial court. There is no due process issue and Miller failed to prove breach of contract.

Miller's final assignment of error, being patently without merit and unsupported by authority, will not be considered. DeHeer v. Seattle-Post Intelligencer, 60 Wn.2d 122, 372 P.2d 193 (1962).

The Port of Ilwaco and Robert Petersen request this court to award their reasonable attorney's fees as terms and sanctions against Miller for bringing a frivolous appeal. See RAP 18.9(a). We agree the appeal verges on the frivolous. However, as noted, the defendants added to the confusion and provided Miller with some basis for his argument when they introduced the subject of police power. In the circumstances we decline to impose sanctions.

The judgment for the defendants is affirmed; terms against Miller are denied.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate

Reports but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

/s/ Reed, J.

WE CONCUR:

/s/ Petrich, C.J.

/s/ Worswick, J.

APPELLANT'S STATEMENT OF FACTS

PORT IS NEGLIGENT: The Port was grossly negligent as evidenced by poor record keeping and assigning the Lulu B. in the same stall with the Lady Luck. The following testimony shows gross negligence in keeping boat records as well as tampering with official records:

With reference to Lulu B (P 73 line 24-25) PETERSEN: That was just an assumption (12½ feet) (P 117 line 24-25) PETERSEN: In the case of the Lulu B., it is written on there, it is 12 feet wide. (P 72 line 20-21) PETERSEN: "It was 11 feet on the application" (NOTE: U.S. Coast Guard records show the exact figure, 11.1 feet).

With reference to Lady Luck. (P 394 line 19-23) PETERSEN: Yes, that is correct, it is indicated that the Lady

Luck was 16 feet in beam -- there has been a mark over the 14.6. (P 125 line 11-13) PETERSEN: Yes (in answer to "Does ledger card indicate 14.6?") (P 122 line 14-15) PETERSEN: It was written on there (16 feet on the document) but that doesn't make the boat that wide. Thus, with records showing the Lulu B. with beam of 11 to 12½ feet and the Lady Luck with beam of 14.6 to 16 feet, the Port was grossly negligent in assigning the two boats within the same stall, measuring 28.9 feet wide, while there were numerous boats in the 8 to 11-foot class on P-float. Furthermore, the deck of the Lady Luck was higher than the top of the railing on the Lulu B., thus making the use of fenders ineffective. Extension brackets upon which to hang the fenders on the Lulu B. would have been required; plaintiff offered to provide

such brackets but the offer was rejected by Petersen (P 63 line 12-20). Furthermore, despite the Port's allegations of the various hazard characteristics of the Lulu B., the Port at no time offered the plaintiff an opportunity to make any modifications, if such were necessary or deemed desirable. Modifications to guard against hazards would have been required by the U.S. Coast Guard prior to certification.

MARSH'S OPENING AND CLOSING STATEMENTS:

In his opening statement Marsh accused the plaintiff of deliberately quitting the charter business owing to Lulu B. not being competetive. No testimony or records were ever presented to substantiate this claim; thus the claim was made to influence the jury against the plaintiff. On the other hand, the plaintiff did everything possible to

continue his charter business; cooperated in every way possible to resolve the port's mis-assignment of moorage in 1977 (page 347 CLEMENTS: "We worked on it all summer".) Plaintiff offered to make any modifications to the boat to satisfy Port, but Petersen refused offer (page 63 line 11-12). Plaintiff spent over \$500 dollars in attorney fees during August 1977 to February 1978. Elliott's letter of November 1, 1977 clearly shows intent was to obtain a moorage and avoid losing boat to creditors. Plaintiff purchased \$400 license for the 1978 season. In his closing statement, Marsh claimed that the Port offered the plaintiff two berths and that the offer was refused by the plaintiff; testimony and records show no such offer was ever made. On the other hand, Port's letter of September 26, 1977 stated that if two berths were available

within the same stall, plaintiff would be assigned one of them. (Page 345 line 11-13, CLEMENS: "There is always a waiting list"). Thus, any vacancy would immediately be filled, therefore two vacancies would never occur. Thus, the Port's stipulation consisted of an outright refusal of a moorage. The Port's claim that P-2 was assigned to the plaintiff is false, Port's letters of September 26, 1977 and February 22, 1978 indicated that such an assignment was never made. Port's records showed that notice of P-2 offer, presumably prepared by Office Manager Clemens, was designated "hold" by Petersen, the Port Manager, and thus was never sent to the plaintiff. In testimony, Petersen (page 106 line 23 and Page 132 lines 11-13) and Clemens (page

349 lines 9-11) admitted no knowledge that the offer was sent to the plaintiff. The Port failed to grant plaintiff a moorage despite knowledge that plaintiff's boat would be repossessed if moorage was not granted; Elliott's letter of November 1, 1977, clearly showed resultant damage if moorage was not granted. Indicating complete lack of concern for the plaintiff, the Port did not answer Elliott's letter until February 22, 1978, a time lapse of 16 weeks. The reply clearly showed that no moorage would be granted to the plaintiff, admitting that the Port faced a possible damage suit as a result. As a result of the Port's failure to provide a moorage, the plaintiff's boat, valued at \$32,000, was repossessed and plaintiff was forced out of the charter business. At no time since 1977 did the Port make

any offer whatsoever that would restore plaintiff to the charter business.

The Port's claim that the Lulu B. was not competitive is without foundation, there was never any intention to compete with the fast fiberglass boats. The Lulu B. featured an exceptionally smooth ride because of its 30-ton weight and low center of gravity, inside accommodations, sleeping facilities, deck close to water, and freedom from exhaust fumes. No other boat operating at the mouth of the Columbia River possessed all these features. Such features are desirable for senior citizens, passengers susceptible to sea-sickness, and others who prefer a smooth riding boat to fancy frills. The plaintiff was on the Board of Directors of Metro Senior Citizens, a retired government employee, and a

resident of Portland, Oregon since 1953; thus had contact with a large number of potential clients. In addition, plaintiff's brother in Missoula, Montana, booked numerous clients, owing to his contacts as operator of a grocery store and meat market. In summary, plaintiff had no difficulty booking sufficient clients to operate profitably. Furthermore, owing to comparatively low initial cost and lower fuel consumption, the Lulu B. had a competitive advantage costwise.

PLAINTIFF WAS DENIED PROPERTY RIGHTS:

The Port gave preferential treatment to Gaskill, thus denying the plaintiff of his property rights. Contracts issued by the Port for P-40 to plaintiff and P-58 to Gaskill are identical and both are subject to the same rules set in the tariff. Yet Port claims that Gaskill's

contract is permanent (rb page 1 lines 10-11), notwithstanding that "boats can be moved each year" is stated in the contract. On the other hand (cp page 30 line 4-7) Petersen states that "P-40 was never assigned on a permanent basis--we used it just for transient boats". Thus, the Port obligated itself to provide a berth P-40 for the full season, accepting full payment, in a written contract, yet retained the privilege of arbitrarily moving the boat at any time during the season stating "we just used it for transient boats". The Port's renting P-40 to another client during the 1977 season was an outright breach of contract with plaintiff unless it admits that it was accepted in trade for P-58 as was the case through verbal contract between the Port and plaintiff. The Port's renting P-40 to another client thus gave

plaintiff property rights to P-58. This property right was in effect on August 3, 1977 when the boat was towed to P-2 by the Port. Gaskill's right to P-58 was relinquished upon his being assigned to P-40, there being no record that he made additional payment for a second berth. The following testimony shows that Gaskill was assigned to berth P-40. Page 30 line 13-14, PETERSEN: He (Gaskill, Lotus II) went to P-40 temporarily. Page 126 line 2-5, PETERSEN: Yes. The Lotus II, which originally has been assigned to P-58 and spent some time in P-40. Page 398 line 16, PETERSEN: We asked him (Gaskill) to take P-40 on a temporary basis. Page 96 line 7-9, PETERSEN: Yes sir, Lotus II was moored in P-40 prior to August 3. The Port is acting arbitrarily in stating that Gaskill had "permanent" right to P-58 (rb page 1, line 10-11)

while at the same time being assigned to P-40, and that plaintiff's boat was "temporarily" docked in P-58 when, in fact, it was docked there in accordance with a verbal contract, wherein his rights to P-40 were assigned to Gaskill.

POLICE ACTION NOT JUSTIFIED: The Port's claim that the Lulu B. was a hazard to adjoining boats, necessitating exercise of police powers, is unjustified. The boat was moored at the Port Basin in 1975 and 1976 during which time it was subject to daily checks made by the Port for trespass and detection of hazards. No complaint was ever recorded as evidenced by the Port's willingness to assign berth P-40 to the plaintiff in 1977. The Lulu B. was certified by the U.S. Coast Guard, the nation's leading authority on boating safety, in 1976, 1977, and 1978, covering the entire period in question. Public

Law 519, 84th Congress, section 2, states that to qualify for certification the vessel "is of a structure suitable for the service in which it is to be employed". The Lulu B. was certified as a 20-passenger charter boat, and as such would be subject to mooring adjacent to other boats. Page 321 line 2-6 and page 32 line 3-4, PETERSEN: "Would moor Miller with another boat as long as the second boat would accept the berth knowing it was moored next to the Lulu B. Page 321 line 2-6, KRAUSHAAR (operator of Alenore in 1977) emphatically approved of the Lulu B. (Kraushaar is qualified by over 20 years active service in the U.S. Coast Guard Auxillary). Page 102 line 14, PETERSEN: "No--Winters did not complain. (Winters is the owner of the Alenore and tenant in berth 56, adjacent to P-58). The best endorsement of the acceptability

of the Lulu B. as a non-hazardous boat comes from Port Manager Petersen, whose appraisal of the Lulu B. is borne out in the following testimony:

Page 29 line 15-16, PETERSEN: Mr. Miller knew we were looking for an alternate berth for him. Page 61 line 2-3, PETERSEN: I tried to find something that was available on P-float. Page 59 line 19, PETERSEN: We offered to try to find a berth for him (Miller). Page 62 line 15-16, PETERSEN: We offered to find Miller some other berth in the basin. Page 345 line 17-19, CLEMENS: Port tried to find a place, hoping someone would move out. Page 37 line 14, PETERSEN: We authorized that move (moving Lulu B. to P-80). Page 60 line 16-17, PETERSEN: I know we offered a berth to him in another part of the basin.

The above testimony did not mention any requirement that the adjoining tenant approve the assignment of the Lulu B., thus giving it unqualified endorsement for any berth commensurate with its size.

The Lulu B. was returned to the Port of Ilwaco on July 21, 1977 for the fishing season and was moored on P-float during the entire period to August 3 and Miller was there during most of the period (see Gaskill testimony) (cp page 372 line 22-25, page 373 line 1-5). If the Lulu B. was a hazard to the extent that police action was required why did the Port wait 12 days before moving the boat? The term "Police Action" implies that immediate action is necessary to protect life and property, thus, the lapse of 12 days show that the action could not in any way be considered police action. Since Miller was present during

the large portion of this period, the Port had adequate opportunity to notify him of pending police action, thus refuting their claim that Miller could not be reached prior to taking police action. Furthermore, moving a boat to protect life and property would entail moving the boat completely away from all other boats, not merely moving it to another space where contacts with other boats could still be made as at P-2 where boat was moved to. P-2 is at the west end of P-float which is oriented S. 57 W. (for practical purposes WSW-NNE) (see sketch). A boat placed at P-2 is completely exposed on three sides, with the bow exposed toward the southwest. The use of fenders can in no way protect another boat from contacting the bow. During periods of heavy traffic boats are held up in the vicinity of P-2,

subjecting them to being blown into the bow of a boat at P-2, with resultant severe damage if winds are strong. The 50-year record of the National Weather Service shows the following maximum winds from the south-west at Ilwaco. Figures are miles per hour (fastest mile), May, 68; June, 66; July, 54; August 60; September 73; October _____. The same record shows no significant winds from the east, refuting the claim of the Port's witnesses, Gaskill and Les Petersen, that strong winds from the east would push the Lulu B. into the adjoining boat. The actual weight of the Lulu B. is 30 tons; thus even a strong wind would not move it significantly in the time required to enter or leave the berth.

The Port erred in its interpretation of police powers which, by definition, is exercised to protect life and property;

not just property alone. The Port exercised police action upon the basis of Les Petersen's testimony that a strong east wind would push the Lulu B. against adjoining boats while mooring, resulting in scratching the surface. Since no protection of life is involved, exercise of police action under these conditions is not justified. Police action does not deny a tenant of a moorage; upon correction of the hazard the boat is returned to its original moorage.

PORT'S ATTITUDE TOWARD SENIOR CITIZENS:

The Port's adverse attitude toward senior citizens was influential in its decision to eliminate plaintiff from the Port of Ilwaco. During 1975 and 1976, the plaintiff's boat, the Lulu B., was moored at the Port of Ilwaco. Although the characteristics of the boat were well known, the Port at no time expressed any

concern about it being a hazard to other boats. In 1977 the plaintiff applied for and was assigned berth P-40, located within 100 feet of the passenger ramp. Under these conditions, the plaintiff booked passengers, including senior citizens, assuring them of the maximum 100-foot waking distance. Upon arriving at the Port with his boat, the plaintiff observed the mis-assignment of berth at P-40 and agreed to accept any berth within 100 feet of the ramp to fulfill his contracts with his clients. After considerable negotiations, Clemens, the office manager, traded P-58 for the plaintiff's P-40 berth, a highly satisfactory solution. After learning of the plaintiff's senior citizen clientele, Petersen embarked upon an objective of moving the Lulu B. to a distant point from the ramp, as indicated by his

testimony (page 29 line 15-16, page 59 line 19, and page 37 line 16-17). He overruled Clemen's decision and without notifying the plaintiff, moved the boat from P-58 to P-2, which is 300 feet from the ramp, thus invalidating the plaintiff's contracts with his clients for August and September. Petersen's testimony (page 138 line 9-13 and page 139 line 1-3) indicated that plaintiff should have "warned" him of the senior citizen clientele. At no time did the plaintiff conceal his catering to senior citizens; he was not asked when applying for the berth. Plaintiff contacted Petersen on August 8, 1977 to resolve the moorage problem. Petersen refused to discuss the matter so plaintiff referred it to Attorney B.K. Smith. In the Port's reply to Smith, dated August of 1977, it, for the first time, claimed that the Lulu

B. was a hazard to other boats, justifying, in its opinion, the move from P-58 to P-2. Subsequently, in a letter to Attorney Elliott, representing the plaintiff, dated September 26, 1977, the Port stated that, with reference to senior citizen clientele, an offer of a moorage within 100 feet of the ramp would constitute a preference and that the Port cannot grant such a preference. Thus, the plaintiff was permanently disqualified to obtaining a berth within 100 feet of the ramp, owing to his senior citizen clientele. It is ironical that berths within 100 feet of the ramp are fully occupied each year, yet owing to the Port's preference policy, none can cater to senior citizens. Adding insult to injury and further showing lack of consideration for senior citizens, Petersen testified (page 138 line 21-25);

Yes, they do - Many seniors have to walk farther than to P-2. (P-2 is 300 feet from the ramp).

GENERAL: Petersen hired a marine expert to measure and appraise Lulu B. during 1978. Except for the measurements, which were already a matter of record, Petersen withheld the expert's report from the court. Plaintiff was present with the expert at the time of appraisal, saw the report, which showed no indication of hazard, and in total agreement with the U.S. Coast Guard certification.

Page 102 line 3-4, PETERSEN: Withheld information to the effect that he was associated with the Baker Bay Development Co., engaged in land development in the Ilwaco area while Bob Petersen, the Port Manager, was a member of CREST, engaged in government land use planning (page 382 line 5-8).

Page 358 line 22-23, PETERSEN: I operated the boat (Alenore) primarily to take out --- for Mr. Winters to take his guests out fishing. The above would require a U.S. Coast Guard license to carry passengers. A check with the U.S. Coast Guard showed that Les Petersen had no license to carry passengers.

Page 382-384: Court permitted Petersen to testify as a naval architect, which he is not qualified to do because he has no college and only a correspondence course in the subject.

Page 73 line 21-23, PETERSEN: --to be helpful to Mr. Miller in finding a berth that was adequate for him, we assumed it had to be wider than 11 feet so we could find him a berth. Page 73 line 24-25, PETERSEN: Yes--assumed it (Lulu B.) was 12½ feet. How could above help Miller get a moorage?

WHY DID PORT MOVE LULU B?: In Port's ANSWER to charges in SUIT. We observed the tight fit. FACT: Clearance was about 7 feet, hardly a tight fit.

In Port's letter to attorney Smith, it (the Lulu B.) has a metal strip the full length of the boat. FACT: No such strip was ever present (see photos).

Page 34 line 6-8, PETERSEN: It's the lack of rub rails on the side. FACT: Rub rails have no function of protecting boats from damage to other boats.

Page 373 line 21-22, PETERSEN: (quoted) Mr. Gaskill, I will get it right out of there. (Responding to Gaskill's request to move the Lulu B.).

Page 138 line 7-10, PETERSEN: That's correct, boat was moved because plaintiff requested it to be moved out of P-40. FACT: Plaintiff made no such request. FACT: Boat was moved from P-58, not at

plaintiff's request; plaintiff was not present when it was moved.

CONCLUSION: The variety of reasons for moving the boat given by the Port indicate that the move was arbitrary and capricious.

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(206) 622-3280

August 16, 1977

Bernard K. Smith

Attorney at Law

8714 Southeast 17th Avenue

Portland, Oregon 97202

Re: Stanley Miller - Port of Ilwaco

Moorage

Dear Mr. Smith:

As you know from our recent telephone
conversation, we are attorneys

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representing the Port of Ilwaco, a municipal corporation. We have reviewed your letter of August 9 with the Manager of the Port District. The history of Mr. Miller's mooring with the Port of Ilwaco has been related to me as follows: He signed an application for moorage approximately three years ago in which he stated that his boat was 38 feet by 11 feet. In the moorage application, he agreed, in paragraph 7 thereof, to comply with applicable ordinances, rules and regulations of the Port District. Mr. Miller's boat was only moored at the Port for a short time during the season three years ago, commencing in late August.

The second year that Mr. Miller moored his boat at the Port of Ilwaco, he

chartered out of Jessie Marchand's office and sublet one of several berths assigned to her and the Port had nothing to do with those arrangements.

This year, Mr. Miller asked to be berthed on "P" float, and the Port, attempting to match up boat lengths and widths with what would be adjoining boats to Mr. Miller's, assigned slip P40 to Mr. Miller. However, it subsequently came to the attention of the Port that Miller's boat is 40 feet by 12 feet and that his boat, being a converted tug boat, has a heavy steel hull with sharp angle steel protruding the length of the side of the vessel. This caused the Port to reconsider the assignment of Berth P-40, since it was perceived by the Port and by numerous other boat owners next to whom the Port might have been able to berth

Mr. Miller's vessel that his boat, in the normal course of the use of a mooring slip, could cause serious damage to other boats.

Therefore, it was necessary for the Port to find a slip for Mr. Miller's boat where, due to its length, width, protruding angular steel and weight, would not cause damage to other boats. The slip which was subsequently assigned to Mr. Miller was, in the Port's best judgment, such a slip.

In terms of the location of the present slip assigned to Mr. Miller, it is closer to a ramp and closer to the automobile parking area than the slip assigned to many other charter boats in the basin. The boat is easily visible in its slip, and is easy for anyone to see, who is

looking for the vessel, who happens to be standing at or near slip P-40.

In the process of accomodating approximately one thousand boats in the Port mooring facilities, it is impossible to make every assignment of moorage binding. The Port must have consideration for the rights and property of all users of the Port and if, for any reason, it becomes apparent at any time that a boat constitutes a danger to other boats because of its size, weight, configuration or whatever, the Port has an obligation to assign that boat to a space which will accomodate the rights of all parties. It is for this reason that the official Tariff of the Port, to which Mr. Miller expressly subjected himself in his moorage application, states in paragraph 7 thereof, that: "the Port of

Ilwaco reserves the right to re-assign all moorage berths each year. No person or firm having priority."

Mr. Miller apparently states that he has a need to be near a ramp because he has passengers who are not ambulatory. At no time did Mr. Miller state to the Port, in writing or otherwise, that he had a special need because of having to provide service to passengers who are not ambulatory.

The Port of Ilwaco has not been arbitrary or capricious in its determination that the berth assigned to Mr. Miller is a proper berth and the Port District is within its rights to make such an assignment. We do not wish to invite a lawsuit, but we suggest that the Port District has made a judgment in this case

which is based upon sound reasoning and
that it would be extremely unlikely that
a court would second guess them.

Yours very truly,

LOUCKS & LAMB

/s/ Robert H. Lamb

RHL:mlr

cc: Robert Petersen, Port Manager

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A Professional Services Corporation

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(206) 622-3280

September 26, 1977

Charles V. Elliott

Attorney at Law

Boise Cascade Building

1600 Southwest 4th Avenue

Portland, Oregon 97201

Dear Mr. Elliott:

Following our recent telephone
conversation, I conferred with the

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Manager of the Port of Ilwaco about Mr. Miller's request that he be given assurance by the Port of Ilwaco that he would be given a moorage for a subsequent year or years that would be of moorage P-40 or, stated otherwise, a moorage within 100 feet of a ramp. I am advised by the Port Manager that the Port cannot do this. Notwithstanding that Mr. Miller may have a number of customers who are non-ambulatory, or not particularly ambulatory, that is true of many charter offices, and even it if were not, the Port cannot grant such a preference. This is true, particularly in view of the basic reason for change of Mr. Miller's prospective moorage from P-40 to his present location, and that is, the fact that his boat is quite undesirable from the standpoint of neighboring vessels, as pointed out in our letter to Mr. Miller's

previous attorney. Where there are vessels which have presently assigned moorages, the Port has a responsibility to see to it that a vessel which has the potential for damaging them that Mr. Miller's boat has, is not forced upon the Port's existing patrons.

However, the Port is willing to assure Mr. Miller that in the event a moorage such as he has requested comes available in a slip where there is no presently existing neighboring vessel, that is, where two slips have become available, the Port is willing to assign such a berth to Mr. Miller. Then, the Port would not be in the position of forcing Mr. Miller as a neighbor upon another vessel. A boat owner who, subsequent to Mr. Miller's being assigned to such a moorage, wanted a moorage adjacent to Mr.

Miller, would be then in the position of making an election to be moored next to Mr. Miller's vessel.

If Mr. Miller is satisfied with this assurance, the Port will do its best to carry it out.

If you have any questions concerning the meaning and intent of the foregoing, please give me a call.

Yours very truly,

LOUCKS & LAMB

/s/ Robert H. Lamb

RHL:mlr

cc: Robert Petersen

1 November 1977

Mr. Robert H. Lamb
Attorney at Law
Suite 820 Logan Building
Seattle, WA 98101

Subject: Stanley Miller - Port of
Ilwaco (moorage problem)

Dear Mr. Lamb:

Your letter of 26 September 1977 was
sincerely appreciated.

Basically, the moorage problem is of
a more serious import than you and I had
previously recognized. Mr. Miller is in
peril of losing his boat because of

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inability to operate his charter business. The Port has expressed as a reason for transferring Mr. Miller's craft from P-40 to a less convenient slip is the peril that Miller's boat would cause damage to other vessels moored alongside.

It appears to me that the Port should give some consideration to the economic difficulties it imposed upon Mr. Miller by their arbitrary transfer of his craft from P-40. In the agreement between the Port and moorage customers, I observe nothing that would provide authority to move any boat from it's pre-assigned slip. Surely the Port has been long aware of the design of Mr. Miller's boat and it is my understanding that for a period of two years they have offered no complaint. In the contract

between the Port and persons using the moorage, the Port is held free and harmless from claims for damage and Mr. Miller is certainly willing to reaffirm this prospect and to stand good for any damage his craft might cause to other vessels. I have enjoined him to use more fenders if necessary, and the vertical sides of his craft render the protection of fenders more effective.

Simply, I regret to see Mr. Miller lose his boat because of the misadventure in moorage. It would seem that the Port could promptly offer some immediate help for us.

I shall certainly appreciate a review of this communication with the Port authorities with a view toward

obtaining a satisfactory and quickly
reasonable solution.

Your courtesy and that of the Port
shall be sincerely appreciated.

Very truly yours,

/s/ Charles V. Elliott

CVE:kf

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February 22, 1978

Charles V. Elliott
Attorney at Law
Suite 927 Boise Cascade Building
1600 Southwest 4th Avenue
Portland, Oregon 97201

Re: Stanley Miller - Port of Ilwaco

Dear Mr. Elliott:

This letter is in response to your letter
of November 1, 1977. I have gone over
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the letter and the entire situation with the Port Commissioners and the Port Manager, and I was instructed by the Commissioners to advise you that the Port cannot offer to do anything for Mr. Miller other than what was offered in our letter of September 26, 1977. We believe the judgment of the Port Manager, backed by the judgment and review of the Port Commissioners, will stand up in court. Mr. Miller should also be advised that, in the event he institutes a legal action against the Port, we will give serious consideration to filing an action against him for malicious prosecution pursuant to the statute recently enacted by the State Legislature.

Yours very truly,

LOUCKS & LAMB

/s/ Robert H. Lamb

RHL:mlr

cc: Robert Petersen

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